

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:18.12.2006

CORAM

THE HON'BLE Mr. JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Civil Revision Petition (NPD) No.485 of 2006
and
C.M.P.No.3562 of 2006

Sivagami

.... Petitioner/2nd Respondent

Vs.

1. S.Mohan
2.K.Ponnusamy

.. Respondents/Plaintiff and
I Defendant

Civil Revision Petition is filed under Section 115 of CPC against the fair and decretal order dated 09.12.2005 made in E.P.No.44 of 2005 in O.S.No.62 of 1999 on the file of Sub Court, Tirupur.

For Petitioner : Mr. G.Vivekanand

For respondents : Mr. Ravi Anantha Padmanabhan-R1
No appearance-R2

O R D E R

Heard the learned counsel for the revision petitioner as well as the learned counsel for the first respondent. The order passed in E.P.No.44 of 2005 in O.S.No.62 of 1999 on the file of Sub Court, Tirupur, is under challenge in this revision petition.

2. The revision petitioner would contend that a fraud has been played by the respondents to get a decree in O.S.No.62 of 1999. But to set aside the decree passed in O.S.No.62 of 1999, neither the first respondent nor the second second respondent had taken any steps by way of appeal. To execute the decree passed in O.S.No.62 of 1999, the plaintiff/1st respondent herein has filed E.P.No.44 of 2005 for delivery of possession. The learned counsel appearing for the first respondent would contend that while an earlier suit in O.S.No.40 of 1983 filed by one M/s P.S.Shanmuga Vadivu Chit Funds, Avinashi against Ponnusamy, son of Kondappa Gounder was pending in respect of

the suit property for realising a mortgage debt, the said Ponnusamy had executed a sale deed in favour of one Sivagami who is the second defendant in O.S.No.62 of 1999. O.S.No.62 of 1999 was filed by T.S.Mohan, who is the auction purchaser of the suit property in E.P.No.107 of 1985 in O.S.No.40/1983 on 4.2.1987. He has filed E.P.No.44 of 2005 in O.S.No.62/1999 for delivery of possession.

3. The contentions of the revision petitioner is that all the legal heirs of Kondappa Gounder were not made party in O.S.No.40 of 1983 and hence the decree passed in O.S.No.40 of 1983 itself is not valid. But to set aside the decree passed in O.S.No.40 of 1983 also there is no steps taken to set aside the same and the decree passed in O.S.No.40 of 1983 has become final as well as the decree passed in O.S.No.62 of 1999 has also become final.

4. The executing Court in its well considered order has given a finding that the alleged sale deed executed by Ponnusamy and other legal representatives of Kondappa Gounder in favour of Sivagami has been hit by Section 52 of the Transfer of Property Act (lis pendens). The learned counsel would represent that this Court may give him liberty to file a petition under Section 47 of CPC. It is represented by the learned counsel appearing for the first respondent that the debt incurred in O.S.No.40 of 1983 was by Kondappa Gounder and his son Ponnusamy, the first defendant in O.S.No.62 of 1999. The executing Court has also given a finding to the effect that the suit property was allotted to the share of Kondappa Gounder as per the partition deed dated 24.10.1966. Both Kondappa Gounder and his son Ponnusamy have executed a mortgage deed in favour of M/s Shanmuga Vadivu Chit Funds. The said chit funds, filed O.S.No.40 of 1983 and obtained a decree against Kondappa Gounder and his son Ponnusamy. The legal heirs of Kondappa Gounder have not filed any suit for partition of the petition schedule property. Under such circumstances, this Court cannot give any liberty to the revision petitioner to file a petition under Section 47 CPC before executing Court, since the executing Court has already dealt with the rights of the parties also in its considered order in E.P.No.44 of 2005 dated 9.12.2005.

5. The learned counsel appearing for the revision petitioner relying on a decision reported in Harnandrai Badridas-v- Debidutt Bhagwati Prasad and others (AIR 1973 Supreme Court 2423) and contended that the question of delivery of possession is relating to the execution and it is to be decided by the executing Court. But a reading of the Judgment will go to show that a petition under Section 47 CPC was filed by the Judgment-Debtor before the executing Court. It has been held by the Apex Court that all questions arising between the auction-purchaser and the Judgment-Debtor must be determined by the executing Court and not by a separate suit. The important question that arose before the High Court of Calcutta was whether the auction sale in execution of a decree, a decree-holder

auction -purchaser can move the executing Court for delivery of vacant possession of an immovable property or whether he has to file a separate suit to get that possession.

5(i) The short facts of the said case are as follows:

"In May 1956 one Debidutt Bhagwati Prasad obtained a money decree against Harnandrai Badridas. In January 1958, Mr.S.Tibrewal, a member of the Calcutta Bar was appointed Receiver in an insolvency proceeding against one Durga Prasad Goinka, a partner of the defendant firm in respect of premises No.99 and 128 Cotton Street, Calcutta for the purpose of selling those properties. On 3 April 1958 Mr.Tibrewal was also appointed receiver in execution of the decree obtained by Debidutt Bhagwati Prasad for the sale of the two premises. On 26 April 1958 the properties were put up to sale by auction and one Kanta Prasad Chotaria was declared the purchaser of premises No.128, Cotton Street for Rupees 52,000/- Kanta Prasad made a deposit of Rs.13,000/- as earnest money. There were, it appears, various proceedings after this at the end of which, on 19 May 1964, there was an order directing the receiver to complete the sale within one month from that date and Kanta Prasad was directed to pay the balance of the purchase money within that time. The receiver was directed to execute and register a conveyance on behalf of the Judgment-debtors who were the owners of premises No.128, Cotton street in case they refused to register the same. The purchaser was by the same order directed to pay interest on the balance of the purchase money from 13 June 1963 to 19 March 1964 in default whereof there was an order not to execute the conveyance. On 17, June 1964 the receiver executed the conveyance on behalf of the Judgment debtor and the insolvent. On 19 June 1964 the purchaser through his attorney requested the receiver to make over possession of premises No.128, Cotton Street. On 23 July 1964 the receiver was further requested by the attorney to make over possession of the premises by the issue of letters of attornment addressed to each tenant in respect of portions which were tenanted and to make over vacant possession of that portion of the premises which was in the occupation of the Judgment-debtor to the purchaser. On 17 November 1964 an application was made praying inter alia

for an order upon the Judgment-debtor to deliver vacant possession of the premises in their occupation to the receiver and also a direction to the receiver to deliver vacant possession of the same to the purchaser. In due course, the Court made an order in terms of that prayer. On appeal against that in the appellate Court the original order was confirmed. Hence the present appeal before the Apex Court.

Under such circumstances, after considering various conflicting definitions by different High Courts in India on the point, the Apex Court observed that so far the conflicting decision before the High Courts were not come to the Apex Court and the question if reaches the Apex Court, that can be resolved once for all.

6. The learned counsel for the revision petitioner relying on the above decision, would contend that if there is a dispute between the auction-purchaser and the judgment-debtor that need not be decided in a separate suit and under the purview of Section 47 of C.P.C., the executing Court itself can sort out the difference between the auction-purchaser and the judgment-debtor. But the facts in the above said case is entirely different from the facts in the case on hand. Here, the first respondent is an auction-purchaser of the property sold in lieu of decree passed in O.S.No.40 of 1983. The first defendant Ponnusamy in O.S.No.62 of 1999, is also the first defendant in O.S.No.40 of 1983. So far, the first defendant Ponnusamy has not challenged either the decree passed in O.S.No.40 of 1983 or the decree passed in O.S.No.62 of 1999 by way of any appeal. It is well settled proposition of law that the executing Court cannot go behind the decree. All the points raised before this Court were raised before the executing Court also and after considering all those points, the learned executing Court has ordered delivery of possession. Not even the legal heirs of Kondappa Gounder have filed any suit for partition of their share in the suit property. They have not come forward with a partition suit because admittedly, the suit property was allotted to the share of Kondappa Gounder under a partition deed dated 24.10.1966. So under the principle "pious obligation" also the legal representatives of Kondappa Gounder are bound to discharge the debt incurred by Kondappa Gounder.

7. The learned counsel appearing for the revision petitioner insists this Court to give a finding against the fraud played upon in getting a decree in O.S.No.40 of 1983 without impleading the legal heirs of Kondappa Gounder. That question cannot be gone into now. If so advised, the parties can file a separate suit and get necessary relief.

8. The learned counsel appearing for the revision petitioner

relying on a decision reported in Indian Bank-vs Satyam Fibres(India) Pvt.Limited(1996) 5 Supreme Court Cases 550) and Bhaurao Dagdu Paralkar-vs- State of Maharashtra and others(2005)7 Supreme Court Cases,605. The facts and the decisions in those two judgments of the Honourable Apex Court have no bearing to the present facts of the case.

9.The learned counsel appearing for the revision petitioner relying on a decision reported in Amiya Prosad Sanyal and another-vs-Bank of Commerce Limited(in liquidation)and others(JT 1996 (1) S.C.148) and contended that it has been held that nine out of the 19 properties which were brought on sale were set aside on the petition filed by the legal heirs and legal representatives of the judgment-debtor. But the facts in the above said case will not be applicable to the present facts of the case because in the judgment relied on by the learned counsel for the revision petitioner, the legal heirs and legal representatives of the Judgment-debtor have taken the sale deed prior to passing of the decree in that suit .But here the second defendant Sivagami has obtained a sale deed during the pendency of the suit which is hit by Section 52 of the Transfer of Property Act (lis pendens).

10.Under such circumstances, this Court is of the view that there is no merit in the civil revision petition and accordingly the same is dismissed. No costs.Consequently, C.M.P.No.3562 of 2006 is also dismissed. The executing Court is directed to dispose of the E.P.No.44/05 in O.S.No.62/99 within two months from the date of receipt of this order.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sg

To
The Subordinate Judge,
Tirupur.(with records if any)

+1cc to Mr.G.Vivekanand, Advocate Sr 63701
+1cc to Mr.K.Ravi Anantha Padmanabhan, Advocate Sr 63465

KG(CO)
km/3.1.

C.R.P. (NPD) No.485 of 2006
and
C. M.P.No.3562 of 2006